

## HOUSE BILL NO. 17

INTRODUCED BY K. PETERSON

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE MONTANA ADMINISTRATIVE PROCEDURE ACT; DELETING IMPLIED AUTHORITY FOR ADJECTIVE OR INTERPRETIVE RULES; CHANGING THE STANDARD FOR LAWFULLY ADOPTED ADMINISTRATIVE RULES; AMENDING SECTIONS 2-4-102, 2-4-110, 2-4-302, 2-4-305, AND 2-4-308, MCA; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 2-4-102, MCA, is amended to read:

**"2-4-102. Definitions.** For purposes of this chapter, the following definitions apply:

(1) "Administrative rule review committee" or "committee" means the appropriate committee assigned subject matter jurisdiction in Title 5, chapter 5, part 2.

(2) (a) "Agency" means an agency, as defined in 2-3-102, of the state government, except that the provisions of this chapter do not apply to the following:

(i) the state board of pardons and parole, except that the board is subject to the requirements of 2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the ARM and the register;

(ii) the supervision and administration of a penal institution with regard to the institutional supervision, custody, control, care, or treatment of youths or prisoners;

(iii) the board of regents and the Montana university system;

(iv) the financing, construction, and maintenance of public works;

(v) the public service commission when conducting arbitration proceedings pursuant to 47 U.S.C. 252 and 69-3-837.

(b) Agency does not include a school district, unit of local government, or any other political subdivision of the state.

(3) "ARM" means the Administrative Rules of Montana.

(4) "Contested case" means a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to ratemaking, price fixing, and licensing.

(5) (a) "Interested person" means a person who has expressed to the agency an interest concerning agency actions under this chapter and has requested to be placed on the agency's list of interested persons as to matters of which the person desires to be given notice.

(b) The term does not extend to contested cases.

(6) "License" includes the whole or part of an agency permit, certificate, approval, registration, charter, or other form of permission required by law but does not include a license required solely for revenue purposes.

(7) "Licensing" includes an agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

(8) "Party" means a person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party, but this chapter may not be construed to prevent an agency from admitting any person as a party for limited purposes.

(9) "Person" means an individual, partnership, corporation, association, governmental subdivision, agency, or public organization of any character.

(10) "Register" means the Montana Administrative Register.

(11) (a) "Rule" means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule.

(b) The term does not include:

(i) statements concerning only the internal management of an agency or state government and not affecting private rights or procedures available to the public, including rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide budgeting and accounting system;

(ii) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;

(iii) rules relating to the use of public works, facilities, streets, and highways when the substance of the rules is indicated to the public by means of signs or signals;

(iv) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when there is a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules is indicated to the public by means of signs or signals; or

(v) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in accordance with 2-4-306 and must be published in the ARM.

(12) (a) "Significant interest to the public" means agency actions under this chapter regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial fiscal impact to or controversy involving a particular class or group of individuals.

(b) The term does not extend to contested cases.

(13) "Substantive rules" are either:

(a) legislative rules, which if adopted in accordance with this chapter and under expressly delegated authority to promulgate rules to implement a statute have the force of law and when not so adopted are invalid; or

(b) adjective or interpretive rules, which may be adopted in accordance with this chapter and under express or implied authority to codify an interpretation of a statute. The interpretation lacks the force of law."

**Section 2.** Section 2-4-110, MCA, is amended to read:

**"2-4-110. Departmental review of rule notices.** (1) The head of each department of the executive branch shall appoint an existing attorney, paralegal, or other qualified person from that department to review each departmental rule proposal notice, adoption notice, or other notice relating to administrative rulemaking. Notice of the name of the person appointed under this subsection and of any successor must be given to the secretary of state and the appropriate administrative rule review committee within 10 days of the appointment.

(2) The person appointed under subsection (1) shall review each notice by any division, bureau, or other unit of the department, including units attached to the department for administrative purposes only under 2-15-121, for compliance with this chapter before the notice is filed with the secretary of state. The reviewer shall pay particular attention to 2-4-302 and 2-4-305. The review must include but is not limited to consideration of:

(a) the adequacy of the statement of ~~reasonable~~ necessity for the intended action and whether the intended action is ~~reasonably~~ necessary to effectuate the purpose of the code section or sections implemented;

(b) whether the proper statutory authority for the rule is cited;

(c) whether the citation of the code section or sections implemented is correct; and

(d) whether the intended action is contrary to the code section or sections implemented or to other law.

(3) The person appointed under subsection (1) shall sign each notice for which this section requires a review. The act of signing is an affirmation that the review required by this section has been performed to the best of the reviewer's ability. The secretary of state may not accept for filing a notice that does not have the signature required by this section."

1  
2       **Section 3.** Section 2-4-302, MCA, is amended to read:

3       **"2-4-302. Notice, hearing, and submission of views.** (1) (a) Prior to the adoption, amendment, or  
4 repeal of any rule, the agency shall give written notice of its proposed action. The proposal notice must include  
5 a statement of either the terms or substance of the intended action or a description of the subjects and issues  
6 involved, the ~~reasonable~~ necessity for the proposed action, and the time when, place where, and manner in which  
7 interested persons may present their views on the proposed action. The ~~reasonable~~ necessity must be written  
8 in plain, easily understood language.

9       (b) The agency shall state in the proposal notice the date on which and the manner in which notification  
10 was given to the primary sponsor as required in subsection (2)(d). If the notification to the primary sponsor was  
11 given by mail, the date stated in the proposal notice must be the date on which the notification was mailed by the  
12 agency. If the proposal notice fails to state the date on which and the manner in which the primary sponsor was  
13 notified, the filing of the proposal notice under subsection (2)(a) is ineffective for the purposes of this part and for  
14 the purposes of the law that the agency cites in the proposal notice as the authority for the proposed action.

15       (c) If the agency proposes to adopt, increase, or decrease a monetary amount that a person shall pay  
16 or will receive, such as a fee, cost, or benefit, the notice must include an estimate, if known, of:

17       (i) the cumulative amount for all persons of the proposed increase, decrease, or new amount; and

18       (ii) the number of persons affected.

19       (2) (a) The proposal notice must be filed with the secretary of state for publication in the register, as  
20 provided in 2-4-312. Within 3 days of publication, a copy of the published proposal notice must be sent to  
21 interested persons who have made timely requests to the agency to be informed of its rulemaking proceedings,  
22 and to the office of any professional, trade, or industrial society or organization or member of those entities who  
23 has filed a request with the appropriate administrative rule review committee when the request has been  
24 forwarded to the agency as provided in subsection (2)(b). Each agency shall create and maintain a list of  
25 interested persons and the subject or subjects in which each person on the list is interested. A person who  
26 submits a written comment or attends a hearing in regard to proposed agency action under this part must be  
27 informed of the list by the agency. An agency complies with this subsection if it includes in the proposal notice  
28 an advisement explaining how persons may be placed on the list of interested persons and if it complies with  
29 subsection (7).

30       (b) The appropriate administrative rule review committee shall forward a list of all organizations or

1 persons who have submitted a request to be informed of agency actions to the agencies that the committee  
2 oversees that publish rulemaking notices in the register. The list must be amended by the agency upon request  
3 of any person requesting to be added to or deleted from the list.

4 (c) The proposal notice required by subsection (1) must be published at least 30 days in advance of the  
5 agency's proposed action. The agency shall post the proposal notice on a state electronic access system or other  
6 electronic communications system available to the public.

7 (d) (i) When an agency begins to work on the substantive content and the wording of a proposal notice  
8 for a rule that initially implements legislation, the agency shall notify the legislator who was the primary sponsor  
9 of the legislation. If the legislation affected more than one program, notice must be given to the primary sponsor  
10 pursuant to this subsection (2)(d) each time that a rule is being proposed to initially implement the legislation for  
11 a program.

12 (ii) Within 3 days after a proposal notice covered under subsection (2)(d)(i) has been published as  
13 required in subsection (2)(a), a copy of the published notice must be sent to the primary sponsor notified under  
14 subsection (2)(d)(i).

15 (3) If a statute provides for a method of publication different from that provided in subsection (2), the  
16 affected agency shall comply with the statute in addition to the requirements contained in this section. However,  
17 the notice period may not be less than 30 days or more than 6 months.

18 (4) Prior to the adoption, amendment, or repeal of any rule, the agency shall afford interested persons  
19 at least 20 days' notice of a hearing and at least 28 days from the day of the original notice to submit data, views,  
20 or arguments, orally or in writing. If an amended or supplemental notice is filed, additional time may be allowed  
21 for oral or written submissions. In the case of substantive rules, the notice of proposed rulemaking must state that  
22 opportunity for oral hearing must be granted if requested by either 10% or 25, whichever is less, of the persons  
23 who will be directly affected by the proposed rule, by a governmental subdivision or agency, by the appropriate  
24 administrative rule review committee, or by an association having not less than 25 members who will be directly  
25 affected. If the proposed rulemaking involves matters of significant interest to the public, the agency shall  
26 schedule an oral hearing.

27 (5) An agency may continue a hearing date for cause. In the discretion of the agency, contested case  
28 procedures need not be followed in hearings held pursuant to this section. If a hearing is otherwise required by  
29 statute, nothing in this section alters that requirement.

30 (6) If an agency fails to publish a notice of adoption within the time required by 2-4-305(7) and the

1 agency again proposes the same rule for adoption, amendment, or repeal, the proposal must be considered a  
2 new proposal for purposes of compliance with this chapter.

3 (7) At the commencement of a hearing on the intended action, the person designated by the agency to  
4 preside at the hearing shall:

5 (a) read aloud the "Notice of Function of Administrative Rule Review Committee" appearing in the  
6 register; and

7 (b) inform the persons at the hearing of the provisions of subsection (2)(a) and provide them an  
8 opportunity to place their names on the list.

9 (8) For purposes of notifying primary sponsors under subsections (2)(a) and (2)(d) who are no longer  
10 members of the legislature, a former legislator who wishes to receive notice may keep the former legislator's  
11 name, address, e-mail address, and telephone number on file with the secretary of state. An agency proposing  
12 rules shall consult the register when providing sponsor notice."  
13

14 **Section 4.** Section 2-4-305, MCA, is amended to read:

15 **"2-4-305. Requisites for validity -- authority and statement of reasons.** (1) The agency shall fully  
16 consider written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency shall  
17 issue a concise statement of the principal reasons for and against its adoption, incorporating in the statement the  
18 reasons for overruling the considerations urged against its adoption. If substantial differences exist between the  
19 rule as proposed and as adopted and the differences have not been described or set forth in the adopted rule  
20 as that rule is printed in the register, the differences must be described in the statement of reasons for and  
21 against agency action. When written or oral submissions have not been received, an agency may omit the  
22 statement of reasons.

23 (2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory  
24 language in order to convey the meaning of a rule interpreting the language, the reference must clearly indicate  
25 the portion of the language that is statutory and the portion that is an amplification of the language.

26 (3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking authority  
27 pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and adopted rule must  
28 include a citation to the specific section or sections in the Montana Code Annotated that the rule purports to  
29 implement. A substantive rule may not be proposed or adopted unless:

30 (a) a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter

1 of the rule as a subject upon which the agency shall or may adopt rules; or

2 (b) the rule implements and relates to a subject matter or an agency function that is clearly and  
3 specifically included in a statute to which the grant of rulemaking authority extends.

4 (4) Each rule that is proposed and adopted by an agency and that implements a policy of a governing  
5 board or commission must include a citation to and description of the policy implemented. Each agency rule  
6 implementing a policy and the policy itself must be based on legal authority and otherwise comply with the  
7 requisites for validity of rules established by this chapter.

8 (5) To be effective, each substantive rule adopted must be within the scope of authority conferred and  
9 in accordance with standards prescribed by other provisions of law.

10 (6) Whenever by the express or implied terms of any statute a state agency has authority to adopt rules  
11 to implement, interpret, make specific, or otherwise carry out the provisions of the statute, an adoption,  
12 amendment, or repeal of a rule is not valid or effective unless it is:

13 (a) consistent and not in conflict with the statute; and

14 (b) ~~reasonably~~ necessary to effectuate the purpose of the statute. A statute mandating that the agency  
15 adopt rules establishes the necessity for rules but does not, standing alone, constitute ~~reasonable~~ necessity for  
16 a specific rule. The agency shall also address the ~~reasonableness component of the reasonable~~ necessity  
17 requirement by, as indicated in 2-4-302(1) and subsection (1) of this section, stating the principal reasons and  
18 the rationale for its intended action and for the particular approach that it takes in complying with the mandate  
19 to adopt rules. Subject to the provisions of subsection (8), ~~reasonable~~ necessity must be clearly and thoroughly  
20 demonstrated for each adoption, amendment, or repeal of a rule in the agency's notice of proposed rulemaking  
21 and in the written and oral data, views, comments, or testimony submitted by the public or the agency and  
22 considered by the agency. A statement that merely explains what the rule provides is not a statement of the  
23 ~~reasonable~~ necessity for the rule.

24 (7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-302,  
25 2-4-303, or 2-4-306 and this section and unless notice of adoption of the rule is published within 6 months of the  
26 publishing of notice of the proposed rule. If an amended or supplemental notice of either proposed or final  
27 rulemaking, or both, is published concerning the same rule, the 6-month limit must be determined with reference  
28 to the latest notice in all cases.

29 (8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies in  
30 citations of authority for rules and in citations of sections implemented by rules. An agency may use an amended

1 proposal notice but, except for clerical corrections, may not use the adoption notice to correct deficiencies in a  
2 statement of ~~reasonable~~ necessity.

3 (9) If a majority of the members of the appropriate administrative rule review committee notify the  
4 committee presiding officer that those members object to a notice of proposed rulemaking, the committee shall  
5 notify the agency in writing that the committee objects to the proposal notice and will address the objections at  
6 the next committee meeting. Following notice by the committee to the agency, the proposal notice may not be  
7 adopted until publication of the last issue of the register that is published before expiration of the 6-month period  
8 during which the adoption notice must be published, unless prior to that time, the committee meets and does not  
9 make the same objection. A copy of the committee's notification to the agency must be included in the  
10 committee's records."

11  
12 **Section 5.** Section 2-4-308, MCA, is amended to read:

13 **"2-4-308. Adjective or interpretive rule -- statement of implied authority and legal effect.** (1) Each  
14 adjective or interpretive rule or portion of an adjective or interpretive rule to be adopted under ~~implied~~ rulemaking  
15 authority must contain a statement in the historical notations of the rule that the rule is advisory only but may be  
16 a correct interpretation of the law. The statement must be placed in the ARM when the rule in question is  
17 scheduled for reprinting.

18 (2) The appropriate administrative rule review committee may file with the secretary of state, for  
19 publication with any rule or portion of a rule that it considers to be adjective or interpretive, a statement indicating  
20 that it is the opinion of the appropriate administrative rule review committee that the rule or portion of a rule is  
21 adjective or interpretive and therefore advisory only. If the committee requests the statement to be published for  
22 an adopted rule not scheduled for reprinting in the ARM, the cost of publishing the statement in the ARM must  
23 be paid by the committee."

24  
25 NEW SECTION. **Section 6. Applicability.** [This act] applies to a rule, as defined in 2-4-102, proposed  
26 or adopted on or after October 1, 2007.

27 - END -